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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK & SONS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

The United States District Court for the Eastern District of Pennsylvania in its written opinion dated March 11, 1936, held that the indictment in the instant case charging that the appellees unlawfully sold certain two-quart metal hampers for fruits and vegetables, in violation of the Standard Container Act of May 21, 1928, charged no offense against the laws of the United States on the ground that such Act does not apply to the manufacture for sale or sale of hampers for fruits and vegetables of a size less than one-eighth of a bushel

(four quarts). The order of the court sustaining the demurrer was made and entered April 14, 1936.

Thereafter on the same day, April 14, 1936, the United States filed in the District Court and presented to the District Judge a petition for appeal, an assignment of errors, and a statement of jurisdiction. While the petition for appeal recited that "on the 11th day of March 1936, a demurrer * * * was by the court sustained", and prayed that the United States be allowed to appeal to this Court "for a reversal of said judgment and order", the statement of jurisdiction, submitted therewith, in paragraph C recited that the judgment sought to be reviewed was entered April 14, 1936, and the assignment of errors prayed that "the judgment of the District Court be reversed." The order allowing the appeal granted an appeal from the "order and judgment of this court" in sustaining the demurrer of the appellees. The only order or judgment of the court sustaining the appellees' demurrer is that of April 14, 1936. The order allowing the appeal recites that it was based not only on the petition for appeal but also on the jurisdictional statement which, under Rule 12, paragraph 1, of the Rules of this Court, was presented to the District Judge simultaneously with the petition for appeal, and which, as stated, correctly recited the date of the judgment or order of the District Court sustaining the demurrer.

I

The Criminal Appeals Act (c. 2564, 34 Stat. 1246; U. S. C., Title 18, Sec. 682) provides that "The writ of error [now appeal] in all such cases shall be taken within thirty days after the decision or judgment has been rendered." The appellees move to dismiss the present appeal on the ground that it was not taken within thirty days from the rendition of the "decision" sustaining the demurrer. It is their contention that such "decision" was rendered by the District Court in its opinion of March 11, 1936, the order or judgment of April 14, 1936, being characterized as an order "sustaining the demurrer a second time." In support of their contention the appellees point to the fact that the Government in its petition for appeal prayed for a reversal of the "judgment and order" made on March 11, 1936.

The Government's petition for appeal was filed and presented to the District Judge subsequent to the filing of the order of the District Court sustaining the demurrer on April 14, 1936. Under these circumstances we think that the reference in the petition for appeal to the date of the judgment and order sustaining the demurrer as "March 11, 1936" may be treated as mere surplusage, as the petition for appeal, without reciting the date of the judgment or order sustaining the demurrer, need only have sought the allowance of an appeal from the order or judgment which had already been en-

tered at the time the petition for appeal was filed and presented to the District Judge. (Cf. *Larkin Packer Co.* v. *Hinderliter Tool Co.*, 60 F. (2d) 491, 495 (C. C. A. 10th) and cases cited.)

The only question presented therefore is whether the opinion of the District Judge on March 11, 1936, may be considered as a "decision" sustaining a demurrer within the meaning of the Criminal Appeals Act, so that the Government was required within thirty days after its rendition to take its appeal.

An opinion is obviously not a "decision" for appellate purposes. It is merely a statement of reasons for or in explanation of a decision. *Albany Perforated Wrapping-Paper Co.* v. *John Hoberg Co.*, 109 Fed. 589, 591 (C. C. A. 7th); see also *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 456. In the Federal courts an opinion is strictly not a part of the record proper, but is included in the transcript certified by the clerk of the lower court to the appellate court simply because its inclusion is ordinarily required by the rules of the appellate court. See Rule 10, paragraph 2 of the Rules of this Court; *England* v. *Gebhardt*, 112 U. S. 502, 506; *Childs* v. *Williams*, 212 Fed. 151, 152 (C. C. A. 8th); *Mutual Reserve Fund Life Ass'n* v. *DuBois*, 85 Fed. 586 (C. C. A. 9th), certiorari denied, 171 U. S. 688; *North American Loan & Trust Co.* v. *Colonial & U. S. Mortg. Co.*, 83 Fed. 796, 803 (C. C. A. 8th); *Nashua &*

Lowell R. Corp. v. *Boston & Lowell R. Corp.*, 61 Fed. 237, 240–241 (C. C. A. 1st); *Hoe* v. *Kahler*, 27 Fed. 145 (C. C., S. D. N. Y.).

It would seem therefore that in granting an appeal to the Government under the Criminal Appeals Act when taken within thirty days of the rendition of a "decision or judgment" sustaining a demurrer, Congress must have had in mind either an *order* or a *judgment* sustaining a demurrer and must have intended that the thirty-day period should run from the entry or filing of the order or judgment sustaining the demurrer. Such a construction brings the Criminal Appeals Act in harmony with the other statutes governing appellate review in the Federal courts. A number of these statutes are referred to in the case of *In re Hurley Mercantile Co.*, 56 F. (2d) 1023, 1024–1025 (C. C. A. 5th), certiorari denied *sub nom. Atascosa County State Bank* v. *Coppard*, 286 U. S. 555, and the court after alluding to the variation in language of these statutes said (p. 1025):

> We think Congress did not intend to establish a varying standard for beginning to count the time for appeal, but intended that the time should run only from the perfecting of the judgment or order as final by its filing with the clerk. Such was the ruling made touching appeals to the Supreme Court in *Seymour* v. *Freer*, 5 Wall. 822, 18 L. Ed. 564; *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 18 L. Ed. 762; *Polleys* v. *Black River*

Co., 113 U. S. 81, 5 S. Ct. 369, 28 L. Ed. 938. In a statute relating to judgments reviewable in the Supreme Court, the term "rendered" was held to refer to such judgments as had attained appealable perfection. *Yznaga del Valle* v. *Harrison,* 93 U. S. 233, 23 L. Ed. 892. General Order in Bankruptcy XXXVI (11 USCA § 53) fixed the time for appeals in bankruptcy as "within thirty days after the judgment or decree," and this was said to mean thirty days after its entry. *Conboy* v. *First National Bank,* 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal. 2 R. C. L. "Appeal and Error," § 6. We hold this appeal taken within thirty days from the filing with the clerk of the judgment appealed from to be in time.

See also *Williamson* v. *Chicago Mill & Lumber Co.,* 59 F. (2d) 918, 919 (C. C. A. 8th); *Herrick* v. *Cutcheon,* 55 Fed. 6 (C. C. A. 1st); Hughes, *Federal Practice,* Vol. 8, pp. 448–449.

For the reasons stated we respectfully submit that the motion to dismiss should be denied.

II

The District Court in sustaining the appellees' demurrer held that the Standard Container Act of May 21, 1928 (U. S. C., Title 15, Secs. 257–257i), was inapplicable to the manufacture for sale or sale

of two-quart size hampers for fruits and vegetables, its position being that the Act did not purport to fix the standards for any hampers of a capacity of less than one-eighth of a bushel. The appellees, as an alternative to their motion to dismiss, move to affirm the decision of the court below on the ground that its construction of the Act was manifestly correct and that such contruction was supported by the decision of this Court in *Pacific States Co.* v. *White,* 296 U. S. 176, 183, when it said, in referring to the statute, that it "deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel."

We think that a brief analysis of the pertinent sections of the statute will indicate that the instant appeal presents a substantial question as to the construction of the statute. Section 1 of the Act fixes the standards for hampers and round stave baskets for fruits and vegetables and provides that these hampers and round stave baskets shall be of nine designated capacities which range in size from one-eighth of a bushel to two bushels, and it then specifies the cubic contents of each one of the standard hampers and round stave baskets. Section 2 deals with splint baskets for fruits and vegetables in a similar manner. Section 3 permits the Secretary of Agriculture in his regulations under the Act to prescribe "such tolerances as he may find necessary to allow in the capacities for hampers, round stave baskets, and splint baskets

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set forth in sections 1 and 2 of this Act in order to provide for reasonable variations occurring in the course of manufacturing and handling." Section 4 provides specifically "That no manufacturer shall manufacture hampers, round stave baskets, or splint baskets for fruits and vegetables unless the dimension specifications for such hampers, round stave baskets, or splint baskets shall have been submitted to and approved by the Secretary of Agriculture, who is hereby directed to approve such specifications if he finds that hampers, round stave baskets, or splint baskets for fruits and vegetables made in accordance therewith would not be deceptive in appearance and *would comply with the provisions of sections 1 and 2 of this Act.*" (Italics ours.) And Section 5 provides "That it shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this Act: *Provided,* That this Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the Act approved August 31, 1916, entitled 'An Act to fix standards for Climax baskets for grapes and other fruits and vegetables, and to fix standards for baskets and other containers for small fruits, berries, and vegetables, and for other purposes'

(Thirty-ninth United States Statutes at Large, page 673), and the regulations thereunder."

It seems to us that it was the purpose of Congress in this statute to allow the manufacture for sale or sale only of hampers, round stave and splint baskets of the capacities specified in Sections 1 and 2 of the Act. This is emphasized by the provision in Section 3 that the Secretary of Agriculture shall approve only such hampers, round stave and splint baskets which "would comply with the provisions of sections 1 and 2 of this Act." In other words it would seem that the Act permits the use only of such hampers, round stave and splint baskets for fruits and vegetables as are specified in the Act. As the Act does not permit a hamper of a minimum capacity of less than one-eighth of a bushel, or four quarts, its effect is to exclude hampers of two quarts, such as those sold by the appellees.

This construction also finds support in the exception contained in Section 5 to the effect that the Act shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of the earlier Standard Baskets and Containers Act of August 31, 1916 (U. S. C., Title 15, Secs. 251–256). The first section of that Act fixes the standards for Climax baskets for grapes and other fruits and vegetables. This section permits three sizes of Climax baskets, 2, 4, and 12 quarts, and fixes the dimensions of each size. The section

also contains certain special provisions with reference to Climax baskets for mushrooms. The second section of that Act directs that the standard basket or other container for small fruits, berries, and vegetables shall be of certain capacities (dry one-half pint, dry pint, dry quart, or multiples of the dry quart), and fixes the cubic contents of each of the standard containers. The section does not, however, attempt to prescribe either the form or the dimensions of the standard containers. It will be observed that neither of these two sections deals with hampers, round stave, or splint baskets as such. While it would seem that there was no necessity in the later Act of May 21, 1928, specifically to exclude from its operation Climax baskets, berry boxes, and till baskets which comply with the earlier Act of August 31, 1916, as such containers were undoubtedly not known in the industry as hampers,[1] round stave baskets or splint baskets, the exception was evidently inserted in the later Act as a precautionary measure so as to insure that nothing therein contained should in any wise be

[1]A "hamper" is defined by the Secretary of Agriculture in his regulations of June 1, 1933, under the Act of 1928, as follows:

> A container, circular, elliptical, or polygonal at top and/or bottom, the top diameter of which is somewhat greater than the bottom and usually less than the depth, having slatted or solid sides ventilated or nonventilated, and a fabricated or solid bottom which may be loose or fixed in place, or formed by a continuation of the sides.

construed as forbidding the manufacture for sale or sale of Climax baskets, berry boxes, and till baskets when they comply with the provisions of the earlier Act. Thus construed, the two Acts are harmonious in operation. The Act of May 21, 1928, deals exclusively with hampers, round stave baskets, and splint baskets for fruits and vegetables, and permits the manufacture for sale or sale of these types of containers only when they are of the capacities specified in that Act. The Act of August 31, 1916, deals with Climax baskets, berry boxes, and till baskets, or similar containers (other than hampers, round stave baskets, and splint baskets), and permits the manufacture for sale or sale of such types of containers only when they are of the dimensions or capacities specified in that Act. The two Acts are consequently mutually exclusive, each dealing with its own classes of containers and forbidding the manufacture of any container of the classes to which it relates which do not meet its specifications.

That Congress intended by the Act of 1928 to permit only hampers having a minimum capacity of one-eighth of a bushel or a maximum capacity of two bushels is emphasized by a brief consideration of the legislative history of that Act. Prior to the passage of the Act of 1928, there were, as stated in the House Report of the Committee on Coinage, Weights, and Measures (H. Rep. 1129, 70th Cong., 1st Sess., p. 2), about forty different

sizes of hampers, ranging in capacity from one quart to fifty quarts. The consequences of this wide range in sizes were, as the House Report reveals (p. 2), deception of consumers, unfair competition between manufacturers, confusion in the bases for market quotations, and unnecessary manufacturing processes arising from the necessity of producing a large variety of sizes. It was to remedy the evils resulting from the unnecessary range in sizes that the Act of 1928 was passed. Thus, it was stated in the House Report (pp. 1, 2) on the measure that:

> The object and purpose of this legislation is to standardize certain sizes of hampers and baskets used in the marketing of fruits and vegetables, and to make it unlawful to either manufacture, sell, or offer for sale containers not corresponding with those herein mentioned.
>
> * * * * *
>
> The main reasons and purposes for the enactment of this measure may be more fully set forth as follows:
>
> * * * * *
>
> *What it does.*—1. *Establishes standard capacities for hampers, round stave baskets, and splint baskets.*
>
> 2. Requires manufacturers to submit statement of dimension specifications to Secretary of Agriculture for approval.
>
> 3. Requires Secretary of Agriculture to approve of such specifications *if a basket made according to them will conform to one*

> *of the standard capacities set up in the bill* and is not deceptive in appearance.
>
> 4. *Forbids manufacture, sale, or shipment of nonstandard containers.* (Italics ours.)

See also S. Rep. 303, 70th Cong., 1st Sess.; H. Rep. 70, 67th Cong., 1st Sess.; H. Rep. 852, 66th Cong., 2d Sess.

It is evident, therefore, from the legislative history that it was the purpose of Congress to prevent the manufacture for sale or sale of any hamper not conforming to any one of the nine sizes which were prescribed as standard by the Act, excluding as a consequence hampers having a minimum capacity of less than one-eighth of a bushel or a maximum capacity of more than two bushels.

We do not think that the decision of this Court in the *Pacific States Co.* case can be said to be conclusive in the present case. While the sentence from the opinion in that case upon which the appellees rely lends some support to its contention, we do not believe that when that case is analyzed it can fairly be said that this Court's mind was directed to the question which we have here presented, i. e., whether the Standard Container Act of May 21, 1928, applies to the manufacture for sale or sale of *hampers* for fruits and vegetables having a capacity of less than one-eighth bushel.

The question presented in the *Pacific States Co.* case was the validity of an order of a State Department of Agriculture fixing as the standard

containers for raspberries and strawberries pint hallocks of certain dimensions. The plaintiff who assailed the regulation was the manufacturer of a berry container which was neither a hallock nor a hamper but a form of container known as a tin top or metal rim container, and it contended among other things that the standard container prescribed by the State order was in conflict with the Standard Container Act of May 21, 1928. As this Act, however, deals only with hampers, round stave and splint baskets for fruits and vegetables and specifically excepts from its provisions Climax baskets, berry boxes, and till baskets which comply with the Standard Baskets and Container Act of August 31, 1916 (U. S C., Title 15, Sec. 257d), it is evident that the statute had no application to berry containers either of the type referred to in the order of the State Department of Agriculture or of the type manufactured and sold by the plaintiff. The Court itself in the sentence upon which the appellees rely pointed out this distinction when it said that the statute "deals solely with hampers, round stave, and splint baskets." In going further and stating that the statute dealt solely with containers of the character mentioned when "of capacity not less than one-eighth bushel", the Court was not required, in view of the contention before it or the type of containers involved, to give consideration to the question whether the Act prohibited the manufac-

ture for sale or the sale of *hampers* of a capacity less than one-eighth of a bushel.

As a matter of fact, it would seem that the controversy involved in the *Pacific States Co.* case with reference to the conflict between the State order and standards fixed by the legislation of Congress centered principally upon the applicability of Section 2 of the Standard Baskets and Container Act of August 31, 1916, *supra* (U. S. C., Title 15, Sec. 252), which deals with containers ~~of any type~~ for small fruits, berries, and vegetables, *without specifically mentioning the form thereof*, for the Court after the sentence relied upon by the appellees in the present case, goes on at some length to point out the inapplicability of that section because it fixed merely the cubic contents of the containers and made no reference to the dimensions or form thereof, thereby leaving to the individual States the adoption of the standards in these respects if deemed necessary.

For the reasons stated we respectfully submit that the motion to affirm should be denied.

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